87 - 12 60 (1)

Docket No.

SUPREME COURT, U.S.
FILED
DEC 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1987

JESSE J. JOHNSON,

Petitioner,

V.

ANN MCLAUGHLIN,
Secretary of Labor et. al.

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JESSE J. JOHNSON
Pro Se
41 Cornelius Drive
Hampton, Virginia 23666
(804) 838-1244

10 9 PP

QUESTIONS PRESENTED

In this unconstitutionally violated precedent setting case, have the U.S. Courts of Appeals for the District of Columbia Circuit, and the U.S. District Court for the District of Columbia judges, clerks and respondents, Ann McLaughlin, Secretary of Labor et. al. and the Labor Department's Officer of Worker's Compensation Program (OWCP) unconstitutionally denied and most unreasonably delayed petitioner's Federal Employee's Compensation for 11 years (1977-1988) for petitioner's health breakdown, and coerced, involuntary retirement from civil service employment at Fort Eustis, Virginia, caused by biased and racially discriminatory working environment for 13 years (1967-1980); by intentionally violating petitioner's 5th amendment due process and his 14th amendment equal protection

rights; by violating the rules of evidence and the court's own internal rule; by denying, continually, records under FOIA; by violating congressional intent of Freedom of Information Act (FOIA), Federal Employees Compensation Act (FECA), the Administration Act, and Supreme Court decisions; by diverting their decisions from the primary issue of unreasonable delay to the medical issue, which is not filed in the complaint; by grossly, intentionally distorting and falsifying the facts and by unconstitutionally obstructing justice.

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Charles R. Netherton vs. Charles Thomas et. al., CANO 85-0397, U.S. for D.C. (March 1985)

Cuneo vs. Rumsfeld, 180, U.S. App. D.C. 184-189, 55, 1360, 1364 (1977)

Foster vs. Boorstin, 182, U.S. App., D.C. 342, 344, 561, F.2d, 340, 342 (1977)

Gill vs. U.S., 641, F.2d, 195, 197 (5th Circuit) (1981)

Gilbert A. Cuneo vs. Rumsfeld, 180, U.S. App., D.C., 190, 553, F.2d, 1366

Jacqueline and Salvadore A. Dipippa vs. U.S. of America, 689 F.2d, 14, 19 (3rd Circuit) (1982)

Nationwide Building Maintenance, Inc. vs. Artur Simpson, Administrator, U.S. General Service Administration, et. al., 559, F.2d, 704

Kay vs. Burns, 411, FSupp 897, 902 (S.D. NY) (1976)

Paluca vs. Secretary of Labor, 813, F.2d, 524, 528 (1st Circuit) (1987)

TABLE OF CASES continued

Sherwood T. Rodrigues vs. U.S. Secretary of Labor, (C.A. 9) No. 84-1712, 8/26/85

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5 U.S.C. (APA), Section 551 1

5 U.S.C. (FOIA), Section 552 1

*5 U.S.C. (APA), Section 555 1

*5 U.S.C., Section 706 1

5 U.S.C., F.E.C.A., Section 8101 et. seq. 1

Other Authorities

*Fifth Amendment to the U.S. Constitution .....

*Fourtheenth Amendment to the U.S. Constitution .....

*Comptroller Generals, G.A.O. Report to Congress (October 21, 1985) (GAO-HRD-86-12) .....

*Cases or authorities chiefly relied upon are marked by asterisks.

OPINIONS AND GROUNDS FOR INVOKING JURISDICTION

United States Code 28, Section 1254

This action arises under Federal Employees Compensation Act, as amended, 5 U.S. Code 8101 et. seq.; the Administrative Procedures Act (the APA), 5 U.S.C. 511 et. seq.; and the Freedom of Information Act, 5 U.S.C., Section 552 (FOIA).

Contrary to the lower court's reversible dismissal orders, the Federal District Court for the District of Columbia does have jurisdiction in petitioner's case, because F.E.C.A., 5 U.S.C., Section 8101 et. seq. does not divest the courts of constitutional jurisdiction to decide petitioner's case favorably on the extraordinary unreasonable delay issue of nine years (now eleven years), procedural due process violation, equal protection violations; unlawful deprivation of property in the form of denied salary and

compensation income; violation of contract by involuntary retirement; obstruction of justice by the courts; denial of constitutional redress procedures by the army at Fort Eustis, Virginia by OWCP and by the courts as protected by the 5th and 14th Amendments of the U.S. Constitution.

In Paluca v. Secretary of Labor Department at 813 F.2d., 524, 528, the court decided judicial authority to review constitutional issues under 5 U.S.C., Section 8128(b) F.E.P.C.A., but not to review the medical issue due to exclusive jurisdiction. The medical issue was not appealed in complaint. Other authorities are included later in this petition.

Thus the District Court made reversible error when it denied petitioner jurisdiction, and was bias because about three months earlier, the same judge found

jurisdiction due to the short delay of about 1½ years. (Charles R. Neatherton v. Charles Thomas, et al Cano 85-0397, U.S. D.C. for the District of Columbia (March 1985). (Petitioner's case was filed 5 June 1985 after eight years most unreasonble delay by OWCP officials) who ignored more than 1,000 pages of evidence.

On 29 September 1987, the full court of the U.S. Court of Appeals for the District of Columbia Circuit's per curiam order, in violation of the 5th and 14th Amendments due process and equal protection clauses, denied petitioner's motion to the full court to publish its per curiam order in a full opinion relating to petitioner's motion for a rehearing and/or suggestions for a rehearing en banc and to all issues in petitioner's precedent setting case (Appendix 1). (See also Appenix 2).

The per curiam order is based on numerous FOIA violations, false facts, unconstitutional mooting of the unreasonable delay issue and other violations; therefore, the per curiam order is too vague for petitioner to prepare this Writ of Certiorari without the exact reasoning of the D.C. Circuit Court judges. Furthermore, a full opinion could have been reasoned in favor of petitioner, if based on actual facts, laws and the constitution, rather than bias and racial discrimination.

To date, the D.C. Circuit Court clerks have violated the FOIA by refusing to answer petitioner's two following motions which are pending:

1. On 28 and 29 August 1987, petitioner made two motions for: a) statistical information on written complaints against the court clerks and judges of said court;

and (b) written procedure to file complaints with the court. Petitioner has been denied these disclosures to date in violation of the court's own rules, procedure, the constitution, relative decisions, policies and FOIA law. (Appendix 2 and 3) (Petitioner's motions).

On 21 April 1987, under the FOIA, petitioner made a timely motion to the D.C. Circuit Court requesting expedited treatment of his pending FOIA and pending court issues due to the unusually unreasonable delay issue in petitioner's case, pending in courts since 30 October 1985 (Appendix 4, 5, 6, 7, 8 and 18).

The three-judge panel obstructed justice by unconstitutionally avoiding a FOIA reply by issuing a per curiam order on 29/30 April 1987, and on the same date, 30 April 1987, violated FOIA and due process by unconstitutionally

mooting petitioner's timely FOIA motion (See Appendix 4, 5, 6, 7 and 8). This is clearly one instance of a pattern of cleverly unconstitutionally, intentionally refusing to make a favorable decision on FOIA and this precedent setting decision in petitioner's case based on unreasonble delay, bias and racially based breakdown on petitioner's health by the courts and respondents (Appendix 4, 5, 6, 7 and 8).

On August 4, 1987, both the full court and the three-judge panel of the D.C. Circuit Court, denied petitioner's motion, again, by a vague per curiam order for a rehearing based superficially on petitioner's supplemental suggestions written hurriedly by petitioner due to procedural misinformation received by telephone from the court clerks, rather than base their order on a full opinion

based on petitioner's initial motion, and supplemental motion, entire record and briefs in this precedent setting case (Appendix 9, 10 and 11).

The court also denied petitioner a trial De Novo in violation of FOIA. Motion was filed 31 August 1987 (Appendix 12).

The D.C. Court of Appeals unconstitutionally affirmed the Federal District Court for the District of Columbia judgement (Appendix 13, 14, 15, 16 and 18). The issues are not moot; more later.

CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER AUTHORITIES

United States Constitution, Amendment Five:

a. ...No person shall be deprived of life, liberty, or property, without due process of law; ...nor without just compensation.

b. U.S. Constitution fourteen, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

c. Comptroller General's G.A.O. Report to Congress (October 21, 1985) (G.A.O. - H.R.D. 86-12)

STATEMENT OF THE CASE

Petitioner's primary issues are unreasonable delay and refusal by respondents to identify and document, under FOIA, reasons for unreasonable delay. The medical issue per se was not appealed in petitioner's complaint to court due to exclusive jurisdiction by the Labor Department (OWCP) over medical issue under F.E.C.A. However, both lower courts have unconstitutionally avoided the primary issue of unreasonable delay by evasively basing decisions on the medical issue and ignoring dates involved. Thus denying petitioner a constitutional decision based on unreasonble delay to grant compensation for, now, eleven years, by respondents, and refusal to document reasons for delay under the FOIA (1977 to 1988). The court's decision mention 5 years or 7 years as if 5 or 6 months.

The Comptroller General's G.A.O. Report to Congress (October 21, 1985) (GAO-HRD-86-12) after extensive investigation, summarized herein, found that the Office of Worker's Compensation Program is unreasonably delaying compensation without explanation; is violating due process and other inefficiencies which require total revision include due process violations, equal protection, et al. The G.A.O. report is very detailed and lengthy; more, later.

The lower courts have unconstitutionally stated that this case is moot, because OWCP rushed a negative denial of compensation on 10 September 1985 under impact of petitioner's court case filed on 5 June 1985 to try to moot the case. The case in not moot. The Supreme Court has stated that regardless of such status of the case by the agency, the courts

still have jurisdiction in unreasonable delay cases. The citation appears later in this petition.

The three-judge panel denied petitioner a FOIA trial De Novo in a per curiam order on 29 September 1987, in order to protect respondents, and to deny petitioner specific records.

Petitioner filed this action in the District Court for the District of Columbia on 5 June 1985 and complained, in substance, that the respondent, Labor Department, through its agents, the Office of Worker's Compensation Program (OWCP), has most unreasonably denied and delayed petitioner's compensation for 8 years (now 11 years) on his Compensation Claim #A25-109199, filed in January 1977 in violation of 5 U.S.C., Section 555(b) Administrative Procedure's Act (APA) and 5 U.S.C., 55 et. seq.; "within a reason-

able time" and in violation of the Fifth Amendment due process and Fourteenth Amendment equal protection, and in deprivation of property in the form of salary, good healthy working environment, contract violations for continued employment and denied justice and human dignity.

The lower courts have denied petitioner justice based unconstitutionally on false facts, bias, race, procedural due process and equal protection, prevailing Supreme Court decisions, violations of FOIA, flawed basis of mootness, by cleverly avoiding unreasonable delay and by basing their decisions on the medical issue which is not in the complaint.

With regards to unreasonable delay, an administrative agency, the OWCP, Labor Department, has a duty to decide issues set forth before it "within a reason-

able time" in accordance with 5 U.S.C., Section 555 (APA) and constitutional due process, equal protection, case laws and congressional intent. Respondents have not complied with these mandates.

Respondents have refused, under FOIA, to disclose specific records to petitioner in 1979, 1981, 1983, 1984, 1985, and now in 1987, relating to the primary issue and reasons of unreasonable delay. The lower courts have falsely pretended that the records are provided; however, the courts have not identified these so-called records among more than 1,000 records in petitioner's file and have denied petitioner's motion for a De Novo trial under FOIA (Appendix 12).

Lengthy details are in petitioner's appendix, briefs and motions. Legal citations are in this petition under constitutional provisions, statutes and other

authorities. Most undesirable working pressure and hostile working conditions existed at Fort Eustis, Virginia for 13 years. Petitioner was forced to use his current sick leave for 13 years, and one year sick leave without pay (July 1979 to July 1980); and to involuntarily retire in July 1980 due to health breakdown. Petitioner filed his compensation claim due to breakdown in health with OWCP in January 1977; however, eleven years later, OWCP has not granted petitioner compensation without a documented basis for unreasonable delay, even under FOIA, as proved by the Comptroller General's GAO extensive, investigated report to Congress (G.A.O./H.R.O. 86-12, October 21, 1985).

The medical issue was not filed in court; however, is mentioned to prove unreasonable delay. OWCP is falsely pre-

tending that there is conflict of medical opinion as a basis for unreasonable delay; however, their own doctors agreed with petitioner's doctors, that there is no conflict in medical opinion, in writing, on October 18, 1979, October 28, 1981, May 13, 1983, and in 1985 and 1986. Details are shown on pages 13, 14, 15, 16 and 17 of petitioner's Brief for Appellant and in other records. Thus it is obvious that the lower courts and the respondents are delaying compensation because petitioner's health was broken down due to bias and racially discriminatory working conditions applied to petitioner personally at Fort Eustis, Virginia between July 1967 and July 1980 (13 years). This is a precedent setting case.

The Comptroller General's office (General Accounting Office) (GAO) Report to Congress (GAO/HRO 86-12), dtd. October 21, 1985) found by comprehensive investi-

gation, that the OWCP in the Labor Department (and many other subordinates) is not managing its many responsibilities in a coordinated, timely manner; without a clear explanation for unusual delays; violates due process; is ineffective; has too vague regulations; other inefficiencies; and need revision. The courts ignored this evidence. For many years, OWCP has intentionally delayed compensation unreasonably, according to other reports.

REASONS FOR GRANTING THE WRIT

Supporting cases which the lower courts refused to consider in their decisions are stated briefly in petitioner's briefs and motions, and in this petition.

The Supreme Court stated: "There is no need for the courts to consider the merits of the issue before the agency... Finally, and most significantly, Congress

has instructed statutory review courts to compel agency action that has been unreasonably delayed. 5 U.S.C., Section 706(1): Telecommunications Research and Action Center et al. v. F.C.C. 750 F.2d. 70 (1984). (Coastel and Pacific Legal Foundation, 445 U.S. 198, 220 N. 14, 100 S. Ct. 1095, 110 8N, 14, 63L Ed. 2d. 329 (1980).

The lower courts made reversible errors when they denied jurisdiction, declared the issue moot, denied FOIA records, based their decision on the medical issue, rather than unreasonable delay of eleven years, and failed to judicially award any compensation within the authority of the courts in violation of 5 U.S.C., Section 706(1) and other legal and constitutional authorities and the intent of Congress.

In Jacqueline and Salvadore A. Dipippa

v. U.S. of America 687, 7.2d. 14, 19 (3rd Cir.) (1982) the court stated:

> "Courts have uniformerly recognized that Congress intended the Federal Employment Compensation Act (FECA) to guarantee Federal employees "surer and more immediate relief in return for foregoing more expensive awards outside the system".

The District Court denied jurisdiction unconstitutionally; declared issues moot; however, unreasonable delay of 11 years is not moot and is in violation of the constitution and Supreme Court decisions (See: Paluca v. Secretary of Labor Department, 813, 7.2d., 524, 528 (1st Circuit 1987) and Rodriguez v. U.S. Secretary of Labor, Raymond J. Donovan et al. (C.A. 9) No. 84-172, August 26, 1985; B. Fletcher, Circuit". Thus the petitioner's case is not moot.

The Supreme Court standard for unreasonable delay, regardless of the merits of the issues pending with the agency,

is 1 or 2 years. A citation is below:

a. "In MCI, we announced that the entire rate making procedure in the 1934 Communications Act revolves around a "rule of reason" ...it assumes that rates will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade...Telecommunications Research and Actions Center et al. v. F.C.C. 750 7.2d. 76 (1984)".

b. Thus it is clear that OWCP violated procedural due process and equal protection, and the courts made reversible error in ignoring obvious evidence of 11 years unreasonble delay without documented reasons as stated in the GAO Report to Congress.

The congressional report on the Federal Employees Compensation Act on May 2, 1974...by the Committee of the Whole House on the State of the Union and ordered

the act to be printed by Mr. Perkins, from the Committee on Education and Labor stated: "It is the purpose of this legislation to begin a program updating the Act, so that it might clearly reflect the most equitable methods for compensation of Federal employees injured while in the performance of their duties..." Union Calendar No. 473, 93rd Congress, 2nd session, Report No. 93-1025. The Senate found that many deficiencies existed in all compensation programs for civilian workers and federal employees as of 1974.

In Gill v. U.S., the court stated: "The heart of the system (FECA) is an implicit bargain; employees are granted surer and more immediate relief in return for foregoing more expensive award outside the system". However, petitioner's claim is being permanently delayed for more than 11 years to date without relief in sight due to numerous constitutional

and regulatory violations by OWCP and by the courts. Gill v. U.S. 641, 7.2d., 195, 197 (5th Cir.) (1981).

The D.C. Circuit recently set forth a six-factor standard which "provides useful guidance in assessing claims of agency delay," Telecommunications Research and Action Center v. F.C.C., 750, 7.2d., 70, 80 (1984) (hereinafter cited as "TRAC"):

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interest prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order

> to hold that agency action as "unreasonably delayed". (Citation omitted)

Plaintiff's case qualifies by the above guidance standard; therefore, he is entitled to compensation.

BIAS AND REVERSIBLE ERRORS

Reversible errors, misstated facts, etc., are too numerous to comment on all of them. For example, the same District Court judge in Charles R. Neatherton v. Charles Thomas, et al., in Civil Action No. 85-0397, U.S. D.C., for the District of Columbia on March 27, 1985, issued a Writ of Mandamus 3 months before plaintiff filed this court action on 5 June 1985. In Neatherton, "unreasonable delay" is only 18 months; in plaintiff's case, unreasonable delay is nine years. The court dismissed petitioner's case and is trying to blame plaintiff, the victim, for OWCP's 9 year's delay and to avoid

unconstitutionally making this precedent setting case.

ATTORNEY FEES

(Generally pro se and FOIA pro se) Appellant substantially prevailed.

Appellant is entitled to reasonable and other litigation costs reasonably incurred, including pro se attorney fees, because he substantially prevailed in all issues, including FOIA issues in October 1979, 1981, 1983, 1984, 1985 and in 1986, because of OWCP's continuous procedural due process violations of FECA, 5 U.S.C., Section 8123(a) and other sections and constitutional violations as stated in petitioner's briefs and motions.

The United States Court of Appeals for the District of Columbia held:

a. "...a court judgement is not a prerequisite for an attorney fee under

the act. (FOIA), (2) The act contemplates the reason exercised of the court's decision, taking into account all relevant factors..." Nationwide Building Maintenance, Inc. v. Arthur Sampson, Administrator, U.S. General Service Administration, et al. 559 F.2d., 704.

b. "Where federal agency voluntarily released information sought by plaintiff in FOIA suit, thereby mooting such suit, plaintiff substantially prevailed". Section 552(a) (4) (E) Gilbert A. Cuneo et al. v. Donald Rumsfeld et al. (U.S. Court of Appeals, District of Columbia Circuit), 553 F.2d. 1360. This was done in petitioner's court case.

"Finally, in Kay v. Burns, 411 F. Supp. 897, 902 (S.D.N.Y. 1976), Judge Carter stated that it was inconceivable that the recovery of attorney fees could be foreclosed whenever the government chose to moot an action under the FOIA by supplying, during the pendency of the litigation, the material sought in the complaint. The court concluded that a proper construction of the "substan-

tially prevailed" requirement in light of Section 552(a) (4) (E)'s legislative history and intent, would not preclude the recovery of attorney fees and litigation costs where the government, after commencement of the litigation, had acted to moot the action by supplying the material sought. Id.

"We believe this view to be correct, and conclude that appellant did substantially prevail within the meaning of Section 552(a) (4) (E). (See: American Federation of Government Employees v. Rosen, 418 F. Supp. at 209. After almost eight years of tedious, hard fought litigation, the government, faced with the appointment of a special master to review the case, decided to supply the material requested. Appellant's action had a causative effect on the government's decision. The government decided to surrender the Manual rather than go through a review by the special master. The case would never have reached the status it did if appellant had not doggedly pursued the matter".

"In enacting Section 552(a) (4) (E), Congress sought to encourage the average person, who would ordinarily find the barriers of court costs and attorney fees insurmountable, to pursue legitimate FOIA actions. The effectiveness of this incentive would be greatly diminished if the complainant was forced to bear the costs whenever the government chose to release the requested information during the pendency of the action, but prior to a judgement or a court order", Cuneo v. Rumsfeld, 180 U.S. App. D.C., 184, 188-189, 553 F.2d. 1360, 1364-64 (1977)".

c. "It is true that a court order compelling disclosure is not a condition precedent to an award of fees". Foster v. Boorstin, 182 U.S. Appeal, District of Columbia, 342, 344, 561, 7.2d., 340, 342, (1977). "Prosecution of appellant's FOIA action is reasonably regarded as necessary to obtain the records". Vermont Low Income Advocacy Council, Inc. Usery, 546, 7.2d., 513 (2d Cir. 1976) "and that a causal nexus exists between that action and the agency's surrender of the information", Cuneo v. Rumsfeld, 180 U.S. Appeal, District of Columbia at 190, 553, 7.2d., at 1366. Thus petitioner substantially prevailed on all issues. Unreasonable delay is obvious to the average citizen - now 11 years. Judges are fully aware of unreasonable delay in this case; however, ignores it due to bias and race.

ARGUMENT

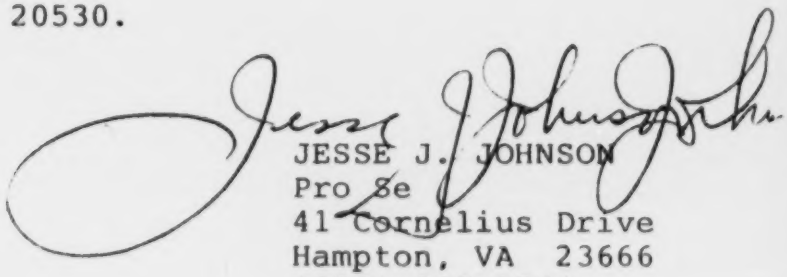
Petitioner's issues have been briefly and adequately proven, document, and supported overwhelmingly by Supreme Court and lower court decisions, congressional intent by petitioner's motions, briefs and appendices. Obviously, the courts have not based their decision on 10 years unreasonable delay of OWCP to grant petitioner compensation, nor any other relief or justice within the powers of the courts. The courts have cleverly and unconstitutionally omitted dates which prove unreasonable delay in their orders. They make statements in the orders which are 5½ to 8 years delayed as if they are only 5 or 6 months delayed. The courts decided on the basis of the medical issue to try to moot the case, falsified facts, violated due process, equal protection and other property and contract violations as set forth herein.

CONCLUSION

Petitioner Jesse J. Johnson, Pro Se, not being familiar with all the format and powers of the Supreme Court, prays that a Writ of Certiorari be issued to review, vacate, reverse, remand or to exercise any authority to the Supreme Court to grant relief and any justice to petitioner after 10 years (1967-1987) unreasonable delay, violations of procedural due process, FOIA, equal protection, property deprivation, involuntary retirement and other violations caused by 13 years most undesirable working conditions, breakdown of health, emotional suffering as a civil service employee at Fort Eustis, Virginia which have been unconstitutionally denied by the lower courts.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition of Writ of Certiorari for Jesse J. Johnson, pro se, was mailed on January 14th, 1988 postage prepaid, by certified mail to The Honorable Charles Fried, Solicitor General of the U.S. Justice Department, Room 5614, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.



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APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term, 1987**
CA No. 85-01955

Jesse J. Johnson

V.

FILED SEP 29, 1987
GEORGE A. FISHER, CLERK

William Brock, Secretary of Labor, et al.

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

O R D E R

Upon consideration of appellant's Motion to the Full Court to Publish Its Per Curiam Order in a Full Opinion, filed August 31, 1987, it is

ORDERED, by the Court, en banc, that appellant's Motion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Boner
Deputy Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 86-5122

JESSE J. JOHNSON,
Appellant,

V.

WILLIAM BROCK, et al,
SECRETARY OF LABOR,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA-CIVIL
THE HONORABLE CHARLES R. RICHEY

FOIA MOTION FOR STATISTICAL INFORMATION

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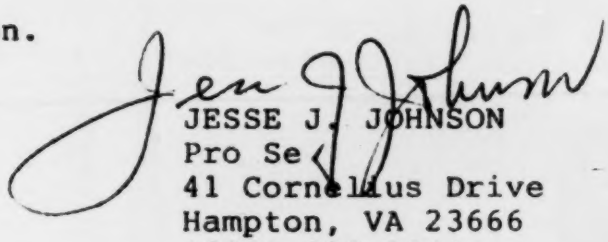
Appendix #2

MOTION FOR STATISTICS
FOIA REQUEST

1. Appellant hereby move that the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit, under the Freedom of Information Act, mailed to the pro se appellant, Jesse J. Johnson, copies of statistical information gathered by the Clerk of Court between January 1984 and August 1987 on the number of written complaints of any type made against the Clerk's office per se, and for obstruction of justice against each of the judges, including identified court cases. Supporting reasons are set forth in appellant's motions for rehearings and motion for publication.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion for statistics for appellant Jesse J. Johnson, pro se, was mailed on 28 August 1987, postage prepaid, by certified mail to Michael J. Ryan, Assistant U.S. Attorney, Room 4205: Attention Attorney Hilda Rosenburg, Special Assistant, Judiciary Center Building, 555 4th Street, N.W., Washington, D.C. 20001.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 86-5122

JESSE J. JOHNSON,
Appellant,

V.

WILLIAM BROCK, et al,
SECRETARY OF LABOR,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA-CIVIL
THE HONORABLE CHARLES R. RICHEY

APPELLANT'S FOIA MOTION FOR WRITTEN PROCEDURES TO FILE FORMAL COMPLAINTS AGAINST THE COURT CLERK AND JUDGES

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Appendix #3

APPELLANT'S FOIA MOTION FOR WRITTEN PROCEDURE TO FILE A FORMAL COMPLAINT AND/OR COURT ACTION AGAINST THE U.S. D.C. CIRCUIT COURT CLERK AND TO FILE OBSTRUCTION OF JUSTICE COMPLAINTS, AND/OR CASE AGAINST JUDGES

1. It is hereby moved that the U.S. D.C. Circuit Court Clerk mail to pro se appellant, Jesse J. Johnson, written procedures, laws, etc. for filing a formal complaint and/or court action against the court clerk and against judges for obstruction of justice or for any other reasons. Please cite all laws, etc.

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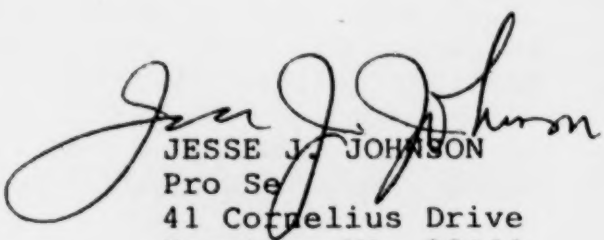
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion for procedure to file complaints for appellant Jesse J. Johnson, pro se, was mailed on 29 August 1987, postage prepaid, by certified mail, to Michael J. Ryan, Assistant U.S. Attorney, Room 4205: Attention Attorney Hilda Rosenburg, Special Assistant, Judiciary Center Building, 555 4th Street, N.W., Washington, D.C. 20001.



JESSE J. JOHNSON
Pro Se
41 Cornelius Drive
Hampton, VA 23666
(804) 838-1244

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C.

JESSE J. JOHNSON,
Appellant

V. Civil Action #86-5122

WILLIAM BROCK et al,
Appellee

APPELLANT'S MOTION THAT THE COURT TAKE JUDICIAL NOTICE THAT FREEDOM OF INFORMATION ACT CASES ARE ENTITLED TO RECEIVE "EXPEDITED TREATMENT" FROM THE COURTS AS REQUIRED BY CONGRESS (Sec. 552(a) (4) (D)) FOIA

1. Appellant moves that the U.S. Court of Appeals for the District of Columbia take judicial notice of the FOIA that issues involved in appellant's case, required by Congress, shall be given "expedited treatment" as shown below:

a. Several FOIA issues are involved in appellant's case. FOIA, Sec. 552(a) (4) (D). "...procedures before District Court...and appeals therefrom take precedent on the docket over all cases...and shall be...expedited in every way". FOIA, Sec. 552(a) (4) (D).

b. In addition to the FOIA issues, the unreasonable delay issue of ten (10) years by the appellee, the Labor Department (OWCP), requires "expedited treatment" by this honorable court.

c. Moreover, but not the least issue, appellant's procedural due process rights under the U.S. Constitution have been continually, deliberately, arbitrarily and intentionally violated and denied since 1967 and 1977 and continuing as set forth in appellant's briefs.

d. Other equally important issues which should be given expedited treatment and included in Appellant's Appeal Brief and Reply Brief and summaries.

e. The time for taking judicial notice of new evidence is stated, "Judicial Notice may be taken at any stage of the proceeding" (See: Jones on Evidence, Civil and Criminal, Sixth Edition, Vol. 4, 1972 Edition by Spencer A. Gard, State District Court Judge in Kansas, page 453, Under Rule 201); (See also pages 1 through 9 of Appellant's Reply Brief, dated September 18, 1986 for details).

2. Dates which prove that appellant is not receiving expedited treatment are listed below:

a. On June 14, 1985 appellant filed a petition for a Writ of Mandamus with the U.S. District of Columbia with Judge Charles R. Richey on an unreasonable delay issue by appellee, pending since January 1977, more than ten (10) years.

b. On 30 October 1985, appellant appealed to the Court of Appeals.

3. These unreasonable delays are physically, emotionally and mentally agonizing.

4. Request for a favorable decision for appellant.

5. Request attorney fees and costs under the FOIA, because appellant has substantially prevailed. Please read arguments and citations which justify attorney fees and costs on pages 13 through 24 of the Appellant's Reply Brief, dated September 18, 1986.

CONCLUSIONS

Appellant's conclusions are stated in the Brief of Appellant, dated May 14, 1986 and in his Reply Brief, dated September 18, 1986.

CERTIFICATE OF SERVICE

I certify that two copies of this motion by appellant Jesse J. Johnson, pro se, was mailed on 21 April 1987, postage prepaid by certified mail, to Michael J. Ryan, Assistant U.S. Attorney, Room 4205, Attention: Hilda Rosenburg, Special Assistant, Judiciary Center Building, 555 4th Street, N.W., Washington, D.C. 20001.

JESSE J. JOHNSON
Pro Se
41 Cornelius Drive
Hampton, VA 23666
(804) 838-1244

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term, 19**
C.A. 85-01955

Jesse J. Johnson,
Appellant

V.

FILED APR 30 1987
GEORGE A. FISHER, CLERK

William Brock, Secretary
of Labor, et al.

O R D E R

It was ORDERED, sua sponte, that the order of April 29, 1987 which dismissed appellant's motion to expedite as moot is vacated in its entirety.

For the Court:
George A. Fisher, Clerk

BY:
Catherine Bateman
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term, 1986**
C.A. No. 85-01955

JESSE J. JOHNSON,
Appellant

V.

William Brock, Secretary
of Labor, et al.

FILED APR 29 1987
GEORGE A. FISHER, CLERK

O R D E R

Upon consideration of appellant's Motion to Expedite, it is

ORDERED by the court, on its own motion, that the motion be dismissed as moot. The appeal has been dismissed.

For the Court:

GEORGE. A. FISHER, Clerk

BY:
Catherine L. Bateman
Deputy Clerk

Appendix #6

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **Septmber Term, 1986**
C.A. 85-01955

Jesse J. Johnson,
Appellant

V.

FILED NOV 28 1986
GEORGE A. FISHER, CLERK

William Brock, Secretary
of Labor, et al.

O R D E R

Upon consideration of appellant's motion that the Court take judicial notice of new evidence regarding his Freedom of Information Act request of September 10, 1986, it is

ORDERED that the aforesaid motion is referred to the panel of this Court that will consider this appeal on the merits.

FOR THE COURT:
George A. Fisher, Clerk

By:
Rosemary Costigan
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term,19**
C.A. 85-01955

Jesse J. Johnson,
Appellant

FILED JUN 10 1987
GEORGE A. FISHER, CLERK

V.

William Brock, Secretary
of Labor, et al.

O R D E R

Upon consideration of appellant's motion to expedite, it is

ORDERED by the Court, on its own motion, that the motion be dismissed as moot. The appeal has been dismissed.

For the Court:

George A. Fisher, Clerk

BY:
Catherine Bateman
Deputy Clerk

Appendix #8

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term, 1987**
CA No. 85-01955

Jesse J. Johnson,
Appellant

V.

FILED AUG 05 1987

William Brock, Secretary
of Labor, et al.

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges

O R D E R

Appellant's supplemental suggestion for rehearing en banc has been circulated to the Full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the supplemental suggestion is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. BOner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term, 1987**
CA No. 85-01955

Jesse J. Johnson

V.

FILED AUG 05 1987

William Brock, Secretary
of Labor, et al.

BEFORE: MIKVA, BUCKLEY and D. H. GINSBURG,
Circuit Judges

O R D E R

Upon consideration of appellant's supplemental petition for rehearing, it is

ORDERED, by the Court, that the supplemental petition is deneid.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Boner
Deputy Clerk

Appendix #10

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Record No. 86-5122

JESSE J. JOHNSON,
Appellant,

V.

WILLIAM BROCK et al,
SECRETARY OF LABOR,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA-CIVIL THE HONORABLE CHARLES R. RICHEY

APPELLANT'S MOTION TO THE FULL COURT TO PUBLISH ITS PER CURIAM ORDER IN A FULL OPINION et al. (EXCERPTS)

JESSE J. JOHNSON
Pro Se
41 Cornelius Drive
Hampton, Virginia 23666
(804) 838-1244

APPELLANT'S MOTION TO THE FULL COURT TO PUBLISH et al

1. In accordance with General Rule 14(e) of the U.S. Court of Appeals for the District of Columbia Circuit, dated August 1, 1987, it is hereby moved that the Full Court publish, withdraw its per curiam order from the District Court, procedurally correct and reverse entirely its unconstitutionally based per curiam orders; and reverse the memorandum of the three-judge panel filed June 10, 1987, and the Full Court's per curiam order filed August 5, 1987 and August 13, 1987 relating to appellant's initial petition and supplemental petition for a rehearing and/or en banc. Note that this motion is timely within the 30 days allowed by General D.C. Circuit Court, Rule 14(e) dated 1 August 1987.

2. It is moved that the above publication and action be based entirely on

both the appellant's petitions filed on 8 June 1987 and on his supplemental petition of 18 June 1987; on his motion for expedited FOIA treatment for specific records; on appellant's briefs; and on relative parts of this case record.

3. The Full Court order filed August 5, 1987 is unconstitutionally based only on "appellant's supplemental" suggestions for rehearing en banc", etc., alone. Appellant's supplement was written hurriedly due to procedural due process violations of erroneous information given this pro se appellant by the D.C. Circuit Court clerks in violation of the Federal Procedures Act, the appellant's Procedures Act, the Federal Civil Procedures Act, laws, court decisions and in violation of the D.C. Circuit Courts own internal court procedures. (See: appellant's petitions filed 8 June 1987 and 18 June 1987).

FACTS RE: D.C. COURT CLERKS PROCEDURAL VIOLATIONS

4. On or about 7 August 1987, date of receipt of the Full Court's per curiam order filed 5 August 1987, appellant telephoned Mr. Robert A. Boner, Deputy Clerk of the D.C. Circuit Court. Appellant complained to him about the Full Court's unconstitutional restriction of the Full Court per curiam order of 5 August 1987 to appellant's "supplemental petition" alone (See: the order). Appellant requested Mr. Boner for time to file a written motion for publication of the Full Court's order based on appellant's motions to petition for rehearing et al, based on his briefs, his petitions, FOIA requests, and relative parts of his record. It is the understanding that the Court is allowed 30 days or more to issue its judgment to the Lower Court, and to publish its opinion. However, the D.C. Circuit

Court clerks knowingly rushed in nine days on 13 August 1987, the Full Court's per curiam order of 5 August 1987, to the District Court, which is unconstitutionally based on only appellant's supplemental petition alone.

5. This appears to be a rush act to push appellant out of Court to avoid a precedent setting decision against appellees, due to the breakdown of appellant's health, due to most undesirable working conditions, due to bias and racial discrimination at Fort Eustis, Virginia for 13 years (1967 to 1980). Overwhelming evidence, laws and citations in favor of appellant.

6. In fact, upon receipt of the three-judge surprise memorandum, a D.C. Circuit Clerk informed appellant that he was not entitled to any time allowed for filing an answer to the three-judge panel's memorandum filed 10 June 1987,

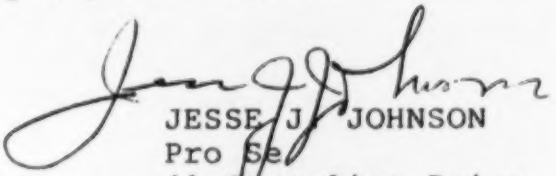
because appellant had used 45 days to reply to the three-judge panel's per curiam order of 29/30 April 1987 as of 8 June 1987. Appellant had been told on or about 3 May 1987 that the three-judge panel would not send appellant a memorandum or full opinion.

7. However, as soon as the clerks received appellant's criticism about not receiving a full opinion from the three-judge panel on 10 June 1987, the clerk, out of reaction, mailed appellant immediately on 10 June 1987, date of receipt of appellant's petitions, the surprise memorandum of the three-judge panel. Obviously, the clerk had withheld in violation of procedure the three-judge panel's memorandum. It was impossible for the panel to prepare such a lengthy memorandum in one day.

8. In addition to the above procedural due process violations, appellant was also knowingly erroneously informed by the clerk when he inquired about time allowed to reply to the three-judge panel, that his 8 June 1987 petition for rehearing had already been distributed to the Full Court, and that any reply by appellant would be too late. However, appellant rushed in his supplemental petition anyway without adequate time to research and prepare his reply; however, the Full Court unconstitutionally restricted its per curiam order to appellant's supplemental petition only, and ignored his other petition, briefs, FOIA records.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion to publish for appellant JESSE J. JOHNSON, pro se, was mailed on 29 August 1987, postage prepaid, by certified mail to Michael J. Ryan, Assistant U.S. Attorney, Room 4205: Attention Attorney Hilda Rosenburg, Special Assistant, Judiciary Center Building, 555 4th Street, N.W., Washington, D.C. 20001.



JESSE J. JOHNSON
Pro Se
41 Cornelius Drive
Hampton, VA 23666

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term, 1987**
CA No. 85-01955

JESSE J. JOHNSON

V.

FILED SEP 29 1987
GEORGE A. FISHER, CLERK

William Brock, Secretary
of Labor, et al.

BEFORE: MIKVA, BUCKLEY and D. H. GINSBURG,
Circuit Judges

O R D E R

Upon consideration of appellant's MOTION for a DE NOVO Trial under FOIA, filed August 31, 1987, it is

ORDERED, by the Court, that appellant's motion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Boner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term 1986**
C.A. No. 85-01955

Jesse J. Johnson,
Appellant

V.

FILED APR 29 1987
GEORGE A. FISHER, CLERK

William Brock, Secretary
of Labor, et al.

BEFORE: Mikva, Buckley, and D.H. Ginsburg,
Circuit Judges

ORDER

The court concludes, on its own motion, that oral argument will not assist the court in this case. Accordingly, the court will dispose of the appeal without oral argument on the basis of the facts and legal arguments presented in the briefs and record. **See** D.C. Cir. Rule 11(d).

The Clerk is directed to send a copy of this order to appellant both by certified mail, return receipt requested, and by first class mail.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 86-5122 **September Term** 1986
C.A. No. 85-01955

Jesse J. Johnson,
Appellant

V.

FILED JUN 10 1987
GEORGE A. FISHER, CLERK

William Brock, Secretary
of Labor, et al

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Mikva, Buckley, and D.H. Ginsburg, Circuit Judges

JUDGMENT

This case was considered on the record on appeal from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. **See** D.C. Cir. Rule 13(c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by the court that the district court order of December 18, 1985 be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. **See** D.C. Cir. Rule 14.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
UNITED STATES COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20001-2866

GEORGE A. FISHER
CLERK

GENERAL INFORMATION
(202) 535-3300

June 10, 1987

RE: No. 86-5122 - Jesse J. Johnson v. William Brock, Secretary of Labor, et al.

Dear Counsel:

I am enclosing herewith a copy of the judgment of this Court entered today in the above entitled case.

Sincerely,

Denise C. Thomas
Opinions CLerk

enclosure

DISTRIBUTION:
Jesse J. Johnson
U.S. Attorney's Office

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
UNITED STATES COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20001-2866

GEORGE A. FISHER
CLERK

GENERAL INFORMATION
(202) 535-3300

August 13, 1987

James F. Davey, Clerk
United States District Court
for the District of Columbia
United States Courthouse
Washington, DC 20001

RE: No. 86-5122 - Jesse J. Johnson v. William Brock, Secretary of Labor, et al. (CA NO. 85-01955)

Dear Mr. Davey:

Pursuant to the provisions of Rule 41 (a) of the Federal Rules of Appellate Procedure, transmitted herewith, in lieu of formal mandate, is a certified copy of this Court's Judgment with Memorandum filed on June 10, 1987.

An additional certified copy of the Judgment is enclosed for delivery to Judge Richey.

Very truly yours

GEORGE A. FISHER, CLERK

BY:
Deputy Clerk

enclosures
cc: All COunsel (letter only).

Appendix #16

MEMORANDUM

Pro se appellant, Jesse J. Johnson ("Johnson"), who originally had filed a disability claim under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C., Section 8101-8151 (1982), with the Office of Workers' Compensation Programs ("OWCP") in 1977, filed a pro se petition for a Writ of Mandamus in district court in 1985 alleging that a decision as to his claim had not been made within a reasonable time. Johnson also filed in district court a pro se request under the Freedom of Information Act ("FOIA"), 5 U.S.C., Section 552 (1982), for records of conflicting medical opinions relating to his claim. The government filed a motion to dismiss and Johnson filed various motions including a motion for summary judgment and an opposition. The district court properly granted the

/

government's motion to dismiss.

In the government's motion to dismiss, it alleged (1) that because OWCP had ruled on Johnson's claim since he filed the petition for mandamus, his petition to compel OWCP to decide his claim was moot; and (2) that Johnson's FOIA request also was moot, because during the course of the litigation, two sets of Johnson's entire OWCP file had been sent to him.

In his motion for "Summary Judgment or Out of Court Settlement, or Such Other Motion Agreed To," Johnson reiterated his argument for mandamus, alleging unreasonable delay, because the government has "refused to finalize a favorable decision." Plaintiff's Motion for Summary Judgment, or Out of Court Settlement, or Such Other Motion Agreed To at 2. Johnson also argued that the government failed to produce the specific records of the conflicting medical opinions that

he requested, but instead provided him with some 1,000 pages of mixed records. Johnson also argued that his constitutional rights had been violated. In the last section of this motion, Johnson suggested a settlement of compensatory pay for the year of July 1979 to July 1980 when he allegedly was forced to take a year of sick leave without pay.

In his opposition to the government's motion to dismiss, Johnson averred that he had never advised the court, the doctor, or anyone else that he would not agree to see an impartial physician in order to resolve the conflict in medical opinion. Johnson further averred that he wrote directly to the government, requesting either a cancellation or postponement of the medical examination until after a decision was issued by the district court. Johnson went on to state that the government was using the issue to

conflicting medical opinions as a "false pretext...to try to moot this case and to try to blame the victim for their unreasonable delay". Plaintiff's Memorandum and Authorities in Opposition to Defendant's Averments and Motion to Dismiss at 4. As to his FOIA claim, Johnson argued that he was entitled to a trial de novo. Finally, Johnson argued that the court had jurisdiction to hear claims of unreasonable delay whether or not the final agency action at issue is subject to judicial review.

In his "Supplement" to his opposition, Johnson repeated his mandamus argument. As to the merits of the government's motion to dismiss, Johnson argued that because the government did not address the unreasonable delay issue, its motion was not valid and could not moot out the case. Finally, Johnson requested the district court to grant any relief

it deemed appropriate.

In his "Post Status Call" motion for summary judgment and opposition, Johnson argued that the court had a duty to impose sanctions on the government for its unreasonable delay. Johnson also claimed, for the first time in his motion, a due process violation. He argued that he had been deprived of his property in the form of denial of employment (involuntary retirement), income, health, and human dignity.

The district court properly granted the government's motion to dismiss. The court framed the issue of agency delay as follows: whether OWCP had unreasonably delayed making a final decision on its reconsideration of Johnson's claim. The relief requested was that the court ordered OWCP to make a final decision within thirty days. Given the fact that OWCP had issued a final decision in denying

Johnson's claim, the court correctly agreed with the government that the petition for mandamus had become moot and therefore should be dismissed. The court further stated correctly that because there is no judicial review of compensation awards under F.E.C.A., 5 U.S.C., Section 8128(b) (2), the court lacked subject matter jurisdiction to review OWCP's decision. If Johnson wished to appeal OWCP's decision, he should have appealed to the Secretary of Labor. 5 U.S.C., Section 8128(a).

In response to Johnson's argument that the government was using the issue of the conflicting medical opinions as a pretext for delay and that the medical examination should be postponed until after the outcome of the case in court, the district court properly held (1) that the question whether the medical opinions were conflicting should be raised

on an agency appeal from OWCP's decision; and (2) that OWCP's requirement that Johnson submit to a medical examination was both reasonable and within OWCP's statutory authority, 5 U.S.C., Section 8123(a).

As to the FOIA request, the court found that the government had twice mailed the entire agency file to Johnson. Johnson had argued that he did not request his entire file which contains over 1,000 pages of material. Instead, he wanted the specific medical opinions which were conflicting. The district court correctly found that the government had, indeed, failed to meet their responsibilities under FOIA, because Johnson had identified the specific documents that he wanted. See: NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975); Bristol-Myers Co. v. FTC, 424 7.2d. 935, 938 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). The

court properly found, however, from the papers filed in the case that Johnson did possess the specific information he requested that he was aware of what medical opinions were conflicting. Therefore the court properly dismissed Johnson's FOIA request as moot.

As to Johnson's motion for summary judgment, the court found that it did not appear in form or substance to be a motion for summary judgment. More specifically, the court found that it did not comport with Fed. R. Civ. P. 56 or Local Rule 1--9(i), because it included neither a statement of material facts as to which there is no genuine issue nor a reference to the part of the record relied on to support any factual statements he did make. Under Haines v. Kerner, 404 U.S. 519, 520 (1972) the district court construed Johnson's pro se motion too narrowly. For example, Johnson's

argument that the issue of unreasonable delay was "obviously irrefutable, beyond argument, not really debatable, and is evidence per se, Plaintiff's Motion for Summary Judgment, or Out of Court Settlement, or Such Othe Motion Agreed To, at 3, could have been construed as a statement of material fact as to which there is no genuine issue were the case still alive. Unfortunately, for Johnson, however, it was irrelevant because OWCP did make a final decision and his petition for mandamus was moot. Similarly, Johnson's argument as to his FOIA request--that he had requested specific records, but was sent instead, a file of over 1,000 pages of mixed records--did state a material fact as to which there was no genuine issue. There was, however, no basis on which to grant the motion, because the issue was moot. Therefore, although the district court was perhaps too harsh

on a pro se plaintiff, it properly denied the motion.

As to Johnson's settlement offer, the district court properly held that it could not compel the parties to settle if the defendents found the terms unacceptable. In re LaMarre, 494 F.2d. 753, 756 (6th Cir. 1974).

The district court's decision, although correct, did not address all of Johnson's arguments. Those arguments, however, were either intrinsically without merit or were without merit, because the case had become moot. The only argument, although ultimately meritless also, that the district court should have at least addressed the due process argument that Johnson made in his "Post Status Call" motion for summary judgment and opposition. Johnson argued that he had been deprived of his proeprty in the form of denial of employment (involuntary retirement),

income, health, and human dignity. Although there is no judicial review of compensation decisions under FECA, a due process claim under the constitution would not have been precluded. Paluca v. Secretary of Labor, slip op. at 2, 4-7 (1st Cir. Mar. 12, 1987). Therefore the district court should have addressed it.

There are two elements in a procedural due process claim: the claimant must (a) identify a protected liberty or property interest, Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972); and (b) specify some element of process that was due, but denied. Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976). Johnson did appear to make an arguably colorable claim as to deprivation of a property interest. It is unnecessary, however, to determine whether Johnson's interest existed, because it appears that OWCP's procedure did not violate the require-

ments of due process. See Wehner v. Levi, 562 F.2d. 1976, 1278 (D.C. Cir. 1977). Due process is a flexible concept. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The procedural protections called for depend upon the circumstances of the case. Id. Here, when Johnson presented OWCP with a new medical report, OWCP vacated its prior determination and informed Johnson that it would conduct a de novo review of his claim once he went for an examination by an impartial doctor. OWCP's request that Johnson be examined was both reasonable and statutorily authorized, because there were conflicting medical opinions. See 5 U.S.C., Section 8123(a). Under the circumstances of this case, OWCP comported with the requirements of due process by notifying Johnson that he was required to get an independent medical examination, and by stating that he would then be entitled

to a de novo hearing on his claim. The fundamental requirement of due process is the opportunity to be heard. Mathews, 424 U.S. at 333. By offering Johnson a de novo hearing, OWCP certainly fulfilled the requirements of due process. Although the district court should have addressed this claim, its decision was correct and should be affirmed. The due process claim is meritless and provides no ground for reversal.

In its brief, the government makes the same arguments it made on its motion to dismiss--with one exception. The government does address Johnson's due process claim which it argues is meritless for the reasons stated above.

In this brief, Johnson states his issues for review as follows: 1) whether the district court had jurisdiction over the issue of agency delay; 2) whether OWCP's delay, due to its own due process

violations, caused or aggravated his mental and physical distress; 3) whether the district court made reversible errors by intentionally misstating the facts and willfully diverting the issue away from awarding him relief for due process violations; and 4) whether the district court had the authority to order the Secretary of Labor to grant any relief the court deems just and appropriate based on the evidence of OWCP's untimely processing of claims as reflected in the Comptroller General's G.A.O. Report to Congress.

In subsequent portions of his brief, Johnson appears that FECA does not divest the district court of jurisdiction to hear procedural due process claims. He further alleges that the procedural due process violation occurred when he was required to submit to a medical examination by an impartial doctor where there

was no medical conflict. Johnson also alleges that a de novo hearing by OWCP is a "farce". Appellant's Brief at 18. Finally, Johnson asks for damages, attorney's fees and costs.

Of the issues raised in Johnson's statement of issues on review, only the first merits consideration. The second issue was never raised below; and the third and fourth issues are meritless. As to the first issue--whether the district court had jurisdiction over the issue of delay--there are no grounds for reversing the district court's decision. Johnson petitioned for mandamus, and once OWCP issued a decision, that petition became moot. Because FECA decisions are not subject to judicial review, 5 U.S.C., Section 8128(b)(2), the district court had no jurisdiction over the issue of delay once OWCP issued a final decision.

The district court does, however,

have jurisdiction to hear a due process claim. See Paluca v. Secretary of Labor, slip op. at 2, 4-7 (1st Cir. Mar. 12, 1987). Although the district court here did not address the due process claim, there are no grounds to reverse its decision. Johnson's due process claim is meritless. For the first time in his brief, he alleges a specific due process violation; the ordering of medical examination when there was allegedly no medical conflict. The court correctly found that the agency's action in ordering the examination was reasonable and the record certainly shows that ample procedure was followed in reaching the conclusion that there was a conflict. Furthermore, Johnson's argument strains credibility in that he obviously submitted the report by Dr. Manley in order to show that it contained a medical opinion that conflicted with the medical opinion upon which OWCP

had previously based its denial of benefits. Additionally, it was Johnson who deprived himself of further due process by refusing to be examined and by insisting that a de novo review by OWCP would be a farce. Finally, Johnson's request for damages, fees and costs should be denied, because his claims are unsuccessful.

Although the district court erred by construing Johnson's pro se motion for summary judgment too narrowly and by failing to address Johnson's due process claim, these errors are not reversible. Therefore, we affirm the district court's order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE J. JOHNSON,)
Plaintiff,)
)
v.)Civil Action No. 85-1955
)
WILLIAM BROCK,)
Secretary of Labor,)
et al.,)

FILED
DEC 18 1985
JAMES F. DAVEY,Clerk

ORDER

The Court has before it the defendant's Motion to Dismiss the plaintiff's opposition thereto and his supplements to the opposition. In addition, the plaintiff has filed a Motion for Summary Judgment, or Out of Court Settlement, or Such Other Motion Agreed To. After considering the arguments raised by both sides in their papers, hearing from the government counsel and the pro se plaintiff at two status conferences, and examining the entire record in this case, the Court finds that it must deny the plaintiff's motion and grant defendent's motion to dismiss.

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Plaintiff, Jesse J. Johnson, filed a Petition for a Writ of Mandamus on June 14, 1985, in which he alleged that the defendants through the Office of Worker's Compensation Programs (OWCP) had not made a decision as to his compensation claim "within a reasonable time" as required by Section 555(b) of the Administrative Procedure Act, 5 U.S.C., Section 551 et seq. (1976). The plaintiff also filed a request purusant to the Freedom of Information Act, 5 U.S.C., Section 552 (1976) (FOIA), which he subsequently amended, for the medical records that the defendants considered conflicting. The plaintiff asked the Court to issue a Writ of Mandamus ordering the defendants to make a final decision in his case within thirty days and further order the defendants to furnish the above-mentioned records of medical opinions.

The plaintiff, Mr. Johnson, is a seventy-one year old former civil service employee who originally filed a claim with OWCP in 1977. At that time he asserted that his health problems resulted from harrassment he suffered while employed at Fort Eustis, Virginia. On July 23, 1982, OWCP rejected the plaintiff's claim stating that his disability was not causally related to the conditions of his federal employment. The plaintiff requested reconsideration soon thereafter. OWCP denied request for modification in July 1983. The plaintiff again requested reconsideration in August 1984, and submitted a medical report by Dr. Manley at that time. OWCP subsequently sent a letter to the doctor requesting clarification. However, OWCP did not receive a reply. In February 1985, OWCP informed the plaintiff that it had vacated its prior determination denying him benefits and would

conduct a de novo review once the plaintiff went for an examination by an impartial doctor to resolve the conflict of medical opinions. The plaintiff then filed this action.

Prior to the first status conference in August of this year, the defendants mailed plaintiff his entire file. This was done again, at the Court's request, after the initial status conference. On September 10, 1985, OWCP issued a final ruling rejecting the plaintiff's claim since he had not appeared for an examination set up by OWCP with an independent physician in order that the conflict as to the plaintiff's condition could be resolved. Plaintiff has asked that the appointment be postponed until the conclusion of this case.

The plaintiff's self-styled Motion for Summary Judgment, or Out of Court Settlement, or Such Other Motion Agreed

To does not comport with Fed. R. Civ. P. 56 or the Local Rules for the United States District Court for the District of Columbia. Specifically, the plaintiff's motion does not include a 1--9(i) statement of material facts as to which there is no genuine issue. Plaintiff has provided some facts mixed with his legal arguments and conclusory statements of law in a section labelled "Background". However, this section does not provide a single reference to the part of the record relied on to support such statement as required by Local Rule 1--9(i). In sum, plaintiff's motion does not appear in form or substance to be one for summary judgment. Instead, it is a combination of the allegations which the plaintiff made in his complaint with a settlement offer to the defendants. While the defendants are aware of plaintiff's offer, they have chosen not to accept it. Moreover, the Court cannot

compel the parties to settle their dispute when either side finds the terms unacceptable. In re Lamarre, 494 F.2d. 753, 756 (6th Cir. 1974). Therefore, the Court finds that it has no alternative but to deny the plaintiff's motion.

Defendants base their Motion to Dismiss on the ground that since the defendants have sent the plaintiff his entire file on medical and nonmedical records and OWCP has ruled on his claim both counts in the plaintiff's cause of action are now moot. The defendants further assert that OWCP's decision in this case is not reviewable by the Court.

Pursuant to the Federal Employees' Compensation Act, 5 U.S.C., Section 8101 et seq. (1976) (FECA), the Secretary has the statutory authority to require claimants to submit to an examination by a medical officer or a physican, provided that the request is reasonable.

5 U.S.C., Section 8123(a). While the plaintiff asserts that the request is wholly unreasonable, the Court finds that the request is a reasonable and proper way to resolve the apparent conflict in medical opinions and to clarify the causal relationship between the plaintiff's condition and his prior federal employment. The defendant made it clear to the plaintiff in a letter from the Assistant Deputy Commissioner, Herman A. Cain, that OWCP would make a de novo determination of the plaintiff's claim once the impartial evaluation was completed. In this instance, the plaintiff could have facilitated the decision-making process by attending the scheduled appointment, however, he chose not to do so, and instead, requested that OWCP wait until after this Court had ruled on his petition for a Writ of Mandamus.

Given that the question the plaintiff has presented to the Court is a narrow one, namely, whether OWCP has unreasonably delayed making a final decision on its reconsideration of his claim and the relief requested is that the Court order the defendants to make a final decision on his claim within thirty days, there does not seem to be any reason why the plaintiff and OWCP should wait for this Court's decision in order to resolve his pending claim. In fact by not submitting to the requested examination, the plaintiff has only prolonged the process and further delayed the possibility of his receiving the compensation benefits which are the underlying basis for his petition presently before the Court.

On Septembe 10, 1985, OWCP issued a decision denying the plaintiff's claim and suspending benefits during the period of refusal pursuant to Section 8123(d)

of FECA. The defendants now aver that under the provision os FECA, the Court cannot review this decision. The Court agrees with the defendants. Section 8128(b)(1)&(2) of FECA states unequivocally that:

> (t)he action of the Secretary of or his designee in allowing or denying a payment under this subchpater is final and conclusive for all purposes and with respect to all questions of alw and fact; and not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C., Section 8128(b)(1)&(2) (emphasis added). The other circuits have read this provision as precluding judicial review of the Secretary's awards of compensation under FECA. See: e.g., Dipippa v. United States, 687 F.2d 14, 17 (3d Cir. 1982); Gill v. United States, 641 F.2d 195, 197 (5th Cir. 1981); Waters v. United States, 458 F.2d 20, 22 (8th Cir. 1972). The Court of Appeals for

this Circuit stated with respect to these provisions, which were formerly in 5 U.S.C., Section 793, that "(t)he federal employees' compensation allowances are grants by the Congress, and the agents of the Congress have the power to determine the recipients of such grants. If Congress chose to preclude judicial review of the selection of the objects of its bounty, it could do so." Calderon v. Tobin, 187 F.2d 514, 516 (D.C. Cir.), cert. denied, 341 U.S. 935 (1951). Since the Secretary has made a decision as to the plaintiff's claim under FECA, the Court cannot conduct a further review of the matter. Moreover, there is no reason for this Court to consider the plaintiff's petition for Writ of Mandamus ordering the Secretary to make a final decision in this case since that decision already has been made. Consequently, the Court finds that the plaintiff's

petition is now moot and must be dismissed. If he wishes to appeal the decision, he must appeal to the Secretary for such review in accordance with the procedures set forth in the provisions of FECA. 5 U.S.C., Section 8128(a).

While the defendants' bring their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(3) (improper venue), the circumstances are such that teh Court lacks authority to hear the case now that OWCP has rendered a final decision. Thus, the case should be dismissed for lack of subject matter jurisdiction rather than for improper venue. Pursuant to Fed. R. Civ. P. 12(h)(3), the Court must dismiss an action when it lacks jurisdiction over the subject matter. Accordingly, defendant's Motion to Dismiss must be granted.

The defendant also moves to dismiss the plaintiff's FOIA request for specific

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medical records which OWCP found to be in conflict. As was mentioned above, the defendants have twice mailed the entire agency file to the plaintiff. However, plaintiff argues that he did not request his entire file, which contains well over 1,000 pages of medical and nonmedical material. Instead, he wants the specific medical opinions which OWCP claims are conflicting and, therefore, require his going for an impartial medical examination. The defendants argue that they have met with their responsibilities under FOIA and are not required to identify certain portions of the record for him. They cite NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975), as the sole support for his proposition. In Sears, the Supreme Court stated that, "the agency (is not) required to identify, after the fact, those pre-existing documents which contain the 'circumstances of the

opinion may have referred, and which are not identified by the party seeking disclosure." Id. (emphasis added).

It seems to the Court that the plaintiff in the present action has identified the specific documents that he wishes the defendants to disclose in that he has provided a "reasonable description (which would enable) the Government employee to located the requested records." Sears v. Gottschalk, 502 F.2d (quoting Bristol-Myers CO. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). At the first status call, the plaintiff did ask for his entire agency file, which the defendant then sent to him. However, at the second status call, he stated that he only wanted the medical opinions which were conflicting. He also had made this specific request in the papers he filed with the Court.

The Court would be included to deny the defendants' motion as to the FOIA request where it not for the fact that the plaintiff can readily identify the medical opinions in question. In fact, it is apparent from the papers filed by the parties in this case that the plaintiff possess the information he now requests. On September 10, 1985, the defendants filed a document entitled "Defendants' Averments in Response to the COurt's Bench Order of August 29, 1985." Attached to it is a "Memorandum To The Director" which is dated February 11, 1985 and signed by Jacquelyn Herron and Thomas Herrill. This memorandum specifically sets for the medical opinions that the claim examiners found to be in conflict. The certificate of process reveals that the foregoing was mailed to the plaintiff the same day that it was filed with the Clerk of this Court.

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While the Court does not agree with the defendants that their sending plaintiff his entire agency file fulfilled his request, the subsequent documents filed with the Court and the plaintiff's responses to those documents indicate that he is aware of what opinions are conflicting. The underlying premise of the plaintiff's argument is that these medical opinions are not in any way conflicting. That issue is not one that this Court can properly consider under the plaintiff's FOIA request. Pursuant to the statute, the Court has jurisdiction "to enjoin the agency from withholding agnecy records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C., Section 552(a)(4)(B). Thus, the Court's powers are limited under FOIA and it cannot make a finding as to the merits of the defendant's representations that these documents

actually are in conflict. This issue is an appropriate one for the plaintiff to raise to the Secretary to consider on appeal from OWCP's decision. Therefrom, the Court must dismiss plaintiff's FOIA request as moot. Accordingly, it is, by the Court, this 17th day of December 1985,

ORDERED that the plaintiff's Motion for Summary Judgment, or Out of Court Settlement, or Such Other Motion Agreed To be, and hereby is, denied; and, it is,

FURTHER ORDERED that the defendant's Motion to Dismiss be, and the same hereby is, granted, and the case shall be dismissed from the dockets of this Court.

CHARLES R. RICHEY
UNITED STAES DISTRICT JUDGE

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